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In the Supreme Court of the United States

OCTOBER TERM, 1968

MARY LOSCHI ET AL.,
PETITIONERS,

v.

MASSACHUSETTS PORT AUTHORITY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF THE MASSACHUSETTS PORT AUTHORITY IN OPPOSITION

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Opinion Below

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported under the name of *Loschi* v. *Massachusetts Port Authority* and appears in Mass. Adv. Sh. (1968) 437 and in 234 N.E. 2d 901. It is reprinted as Appendix A to the petition for certiorari (pp. 18-28), and all references herein to that opinion will reflect the pagination of that reprint.

Jurisdiction

The jurisdictional statement of the petition (p. 2) neglects to advise this Court that under date of March 20, 1968, the Supreme Judicial Court denied a petition for rehearing. It also fails to disclose that on April 28, 1968, the Justice of the Superior Court who had entered the original decree reviewed by the Supreme Judicial Court entered an order dismissing a further appeal from the final declaratory decree which was entered after rescript from the Supreme Judicial Court (App. B, pp. 29-30).[1] Finally, it ignores the fact that on June 4, 1968, six days before the filing of the present petition, the petitioner Mary Pascucci gave the respondent a release of all claims and demands arising out of the takings complained of, a confirmatory deed to the premises taken from her, and an agreement in writing for the disposition of her prior petition for the assessment of damages arising out of the takings (R. 60).

The Questions Not Presented

None of the questions sought to be framed in the petition (pp. 2-3) was presented to the Superior Court of Massachusetts in the first instance or to the Supreme Judicial Court of Massachusetts on review. The petitioners have not complied, and can not comply, with the provisions of Rule 23(1)(f) of this Court because, as will be seen (*infra*, pp. 5-7), the "Questions Presented" (Pet., pp. 2-3) do not exist on this record.

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[1] Such action is permitted by the applicable statute (Mass. G.L. c. 231, § 133, as amended) only if "the justice by whom or by whose order the decree [after rescript] was entered . . . deems that . . . the appeal is claimed merely for the purposes of delay."

Statement of the Case

The respondent Massachusetts Port Authority (the Authority) is a body politic and corporate created by the Massachusetts Legislature (Mass. St. 1956, c. 465, as amended) for the purposes, among others, of owning, operating, maintaining, enlarging and improving Logan International Airport in the East Boston District of the City of Boston. *Massachusetts Port Authority* v. *Clerk of the East Boston District Court,* 350 Mass. 195, 202. *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52, 55, cert. denied 385 U.S. 947. It was given the power of eminent domain by its Enabling Act [Mass. St. 1956, c. 465, § 3(g) and (k)]. Thereafter, in 1963, the Massachusetts Legislature saw fit to restrict the powers of its creature by enacting Mass. St. 1963, c. 410 (App. C, pp. 33-34), which took effect on May 16, 1963, and which provided that the Authority could not acquire land by eminent domain "westerly of the present property line of the . . . airport" except for certain specified purposes, which included "protecting the aerial approaches to runways in accordance with applicable federal standards [and] meeting runway clear zones of the federal government."

The order of taking which was contested in this case was adopted by the Authority on August 8, 1963 (App. A, p. 18). Properties were specifically taken from the petitioners Loschi, Cianci and Pascucci (Pet. pp. 4, 8, 11; App. B, pp. 29-30) but not from any of the petitioners Miraglia, McWhinnie, Baptista or Oliver (Pet., pp. 4, 7, 8). The principal question for decision below was whether the properties of the first three named petitioners had been taken for one or more of the purposes permitted by Mass. St. 1963, c. 410 (App. C, pp. 33-34).

There is no question that those properties were taken in furtherance of the Authority's plans for a 2127 foot

northwesterly extension of Runway 15-33 at Logan Airport to a total length of 10,000 feet. It is quite clear from the plan which accompanies the opinion of the Supreme Judicial Court (App. A, p. 21) and from the opinion itself that the physical extension of the runway does not project beyond the former high water mark of Wood Island Park, that to reach that point no land had to be acquired which was not already owned by the Commonwealth of Massachusetts or by the Authority, and, specifically, that Wood Island Park did not have to be and was not taken by the Authority (App. A, pp. 23 [and fn. 4 thereon], 26). Indeed, a study of the statutory provisions with respect to Wood Island Park which were cited below will disclose that the park was owned by the City of Boston as long ago as 1949, when the city was authorized to convey it to the Commonwealth "to become a part of . . . Logan Airport and subject to all laws pertaining to said airport" (Mass. St. 1949, c. 431, § 1) and that the park and a subsequent addition thereto (Mass. St. 1955, c. 435) were, as the court said, "held [by the Metropolitan District Commission[2]] for potential airport use at the discretion of the Governor and Council" pursuant to the provisions of Mass. St. 1953, c. 528, and Mass. St. 1955, c. 438 (App. A, pp. 26, 23).

Both courts below held that the properties of the first three petitioners had been taken for two of the purposes permitted by Mass. St. 1963, c. 410, namely, for the "purpose of protecting the aerial approaches to [Runway 15-33] in accordance with applicable federal standards" and for the "purpose of meeting runway clear zone requirements of the federal government" with respect to that runway (App. A, pp. 18-19, 26-27, 28; App. B, pp. 29-30). Both courts also held that none of the petitioners had any standing to question the Authority's use of Wood Island Park for airport purposes (App. A, pp. 18, 27-28).

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[2] An agency of the Commonwealth.

Argument

The first question sought to be presented by the petition (pp. 2-3) is whether under the Due Process Clause of the Fourteenth Amendment the four petitioners from whom properties were not specifically taken (Miraglia, McWhinnie, Baptista and Oliver) "have standing to challenge the validity of *intervening takings* that will bring the runway and its 'clear zone' into immediate proximity with their properties and result in a taking of their properties under the doctrine of *United States* v. *Causby,* 328 U.S. 256 and *Griggs* v. *Allegheny County,* 369 U.S. 84" (emphasis supplied). It is clear that the words "intervening takings" do not have reference to the properties specifically taken from the petitioners Loschi, Cianci and Pascucci because all seven petitioners were named as parties in the original bill of complaint (R. 1-3), continued to be parties until the conclusion of the case (R. 119-121), and were in fact permitted to litigate the takings made from only three of them. Even a cursory reading of Part I of the petitioners' Argument will disclose that the "intervening takings" postulated in the question can only mean a supposed taking of Wood Island Park (Pet., pp. 8, 9, 10). As we have already seen (*supra,* p. 4), Wood Island Park had been publicly owned and subject to possible appropriation for airport purposes as early as 1949 and was not taken by the Authority in 1963. The fundamental postulate of the first question falls, and so does the question.

The same is true of the second question, which is stated to be whether under the same Due Process Clause the three petitioners from whom properties were taken (Loschi, Cianci and Pascucci) "have standing to challenge the validity of *intervening takings,* where the taking of their properties would not be required by federal safety standards if the *intervening takings* are invalid" (Pet., p. 3;

emphasis supplied). Study of Part II of the Argument reveals that once again the words "intervening takings" have reference only to Wood Island Park (Pet., p. 11), which was not taken by the Authority. The major premise of the question is false, and so is the issue sought to be presented.

Both parts of the third question rest on the express assumption that "the state court held [that] a grant of money by the Federal Aviation Agency for an airport runway extension upon application by an airport authority *ipso facto* constitutes the establishment of a federal safety standard" (Pet., p. 3). The assumption becomes an assertion at no less than eight different points in Part III of the Argument (Pet., pp. 12, 13, 14, 15, 16-17, 17). The assumption (assertion) is based on a misreading or complete misunderstanding of what the Supreme Judicial Court did and said. The problem before that court was to determine the purpose(s) of the takings and whether permitted by the express provisions of Mass. St. 1963, c. 410 (App. C, pp. 33-34). The court did look at the background, language and contents of the 1963 grant agreement between the Authority and the FAA[3] by which the latter promised to participate in the cost of acquiring the properties taken (App. A, pp. 23, 24, 25, 26), but it is clear from the opinion that the court did so only in order to identify the actual purposes of the takings (App. A, pp. 26-27). The court seems to have assumed, quite properly, that the FAA would not have executed the grant agreement without first being satisfied that the clear zone planned for the extended runway would meet the standards previously established

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[3] The grant agreement is not found in the printed record which is before this Court. It is one of the fifteen exhibits certified in original form to the Supreme Judicial Court (R. 123) but is not included in what appears to have been certified to this Court in supposed compliance with the provisions of Rule 21(1).

under the rules and regulations cited in footnote 6 to the opinion (App. A, p. 25), but it never held, or even suggested, that the agreement itself determined, or constituted the establishment of, a new or particular safety standard peculiar to Runway 15-33.[4] It follows that the third "question" stated in the petition (p. 3) does not even exist on this record.

None of the arguments made to this Court was presented to either of the courts below. A glance at the petitioners' brief before the Supreme Judicial Court[5] will disclose absolutely no reference to *Causby* or *Griggs*, to any subsequent case dealing with the doctrine of those cases, or even to the doctrine itself.[6] As this Court has recently said, "the record relevant to the constitutional claims now asserted is insufficient to permit decision of those claims." *Johnson* v. *Massachusetts*, U.S. , 88 S. Ct. 1115. Further, the brief does not even contain any reference to the Federal Airport Act (49 U.S.C. §§ 1101 et seq.) or to any of the rules and regulations promulgated by the Administrator of FAA under authority of 49 U.S.C. § 1354(a) which originally appeared in 27 F.R. 12349 and are now found in 14 CFR §§ 151.1 et seq. Much less was there any argument as to the validity, application or proper interpretation of any statutory or regulatory provision which may be pertinent. It is manifest that no substantial Federal question was, or can now be, presented. Quite to the contrary, the only question presented or considered was solely

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[4] The Authority does not understand the argument advanced at pages 15 to 17 of the petition to assert that the petitioners had any right to prior notice of or hearing on any question involving the proper application of any previously existing rules or regulations such as those noted by the Supreme Judicial Court.

[5] A copy is attached to the Authority's opposition to the petitioners' application for stay filed under 28 U.S.C. § 2101(f).

[6] The Supreme Judicial Court's Full Court Rule 1:13 provides that "The court need not pass upon questions or issues not argued in briefs." 351 Mass. 731, 738.

a State question as to the proper interpretation of an act of a Legislature which wished to curtail the exercise of the broad power of eminent domain which it has previously delegated to its own creation.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,
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